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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 232

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, JAMES C. ANDERSON, PRESIDENT, ET AL.,
Appellants,

vs.

ROBERT M. DAWSON, JR., ET AL.,
Appellees.

R. BROOKE MAXWELL, CHAIRMAN; BERNARD I. GONDER; H. LEE HOFFMAN, SR.; J. MILES LANKFORD; J. WILSON LORD, CONSTITUTING THE COMMISSION OF FORESTS AND PARKS OF MARYLAND, ET AL.,
Appellants,

vs.

MILTON LONESOME, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

C. FERDINAND SYBERT,
Attorney General of Maryland,
NORMAN P. RAMSEY,
Deputy Attorney General of Maryland,
AMBROSE T. HARTMAN,
Asst. Attorney General of Maryland,
1201 Mathieson Building,
Baltimore 2, Maryland,
THOMAS N. BIDDISON,
City Solicitor of Baltimore,
EDWIN HARLAN,
Deputy City Solicitor of Baltimore,
HUGO RICCIUTI,
FRANCIS X. GALLAGHER,
Assistant City Solicitors,
Court House,
Baltimore 2, Maryland,
Attorneys for Appellants.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellants appeal from the judgments of the United States Court of Appeals for the Fourth Circuit, entered on March 14, 1955, reversing the final judgments of the United States District Court for the District of Maryland, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 220 Fed. 2d 386.

The opinion of the United States District Court for the District of Maryland is reported in 123 Fed. Supp. 193.

Copies of the opinions of each of the Courts are attached hereto as Appendix A.

JURISDICTION

These suits were brought under Title 28 U.S.C., Section 1331; Title 8 U.S.C., Sections 41 and 43; Title 28 U.S.C., Section 1343; Title 28 U.S.C., Sections 2201-2202; and Rules 23A, 57 and 65 of the Federal Rules of Civil Procedure. The judgments of the District Court were entered on the 25th day of August, 1954; notice of appeal was filed in that Court on the 17th day of September, 19 the judgments of the United States Court of Appeals for the Fourth Circuit were entered on the 14th day of March, 1955; and notice of appeal was filed in that Court on April 30, 1955. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28 U.S.C., Section 1254(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgments in these cases: *McCarrol, Commissioner of Revenues of Arkansas v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 60 S. Ct. 504, 84 L. Ed. 683; *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 S. Ct. 371, 76 L. Ed. 747; *People of the State of New York v. Latrobe*, 279 U.S. 421, 49 S. Ct. 377, 73 L. Ed. 776; *Republic Pictures Corp. v. Kappler*, 327 U.S. 757, 66 S. Ct. 523, 90 L. Ed. 991, rehearing denied 327 U.S. 817, 66 S. Ct. 804, 90 L. Ed. 1040; *Keating v. Public Nat. Bank*, 284 U.S. 587, 52 S. Ct. 137, 76

L. Ed. 507; *City of Richmond v. Deans*, 281 U.S. 704, 50 S. Ct. 407, 74 L. Ed. 1128.

While the above cases were decided under section 240 of the Judicial Code (Title 28, U.S. Code, 1946, sec. 347) before its recent revision, the present section, as revised by the Act of June 25, 1948 (Title 28, U.S. Code, sec. 1254(2)), is substantially identical. See reviser's notes to revised section 1254. See particularly: *Williams v. Bruffy*, 96 U.S. 176, 183; *King Manufacturing Co. v. Augusta*, 277 U.S. 100, 104-105; *Eclipse Mills Co. v. Dept. of Labor & Industry*, 277 U.S. 136.

QUESTIONS PRESENTED

I. Where State and City administrative bodies exercising legislative power maintain separate but admittedly physically equal public beach and bathhouse facilities for Negroes and whites, does the maintenance of such public recreational facilities on a segregated basis violate any right guaranteed by the Fourteenth Amendment to the Constitution of the United States?

II. If the action of State and City Administrative bodies exercising legislative power in maintaining separate but admittedly physically equal facilities in the field of public recreation is violative of the Fourteenth Amendment to the Constitution of the United States, when and in what manner must redress or remedy be afforded to the Appellees?

STATUTES INVOLVED

Segregation on the basis of race has been the accepted practice in Maryland for many years. This practice, based on the "separate but equal" doctrine of *Plessy v. Ferguson*,

163 U.S. 537, has been specifically applied to the field of public recreation. *Durkee v. Murphy* (1942), 181 Md. 259, 29 A. 2d 253; *Law v. Mayor and City Council* (D.C.-Md. 1948), 78 Fed. Supp. 346; *Boyer v. Garrett* (D.C.-Md. 1949), 88 Fed. Supp. 353, aff'd. (CCA 4) 183 Fed. 2d 582, cert. den. 340 U.S. 912.

The instant proceeding involves the actions of the Appellants, Mayor and City Council of Baltimore and its Board of Recreation and Parks on the municipal level, and the Commissioners of Forests and Parks of the State of Maryland, and the Superintendent of Sandy Point State Park and Beach on the State level, in carrying out the established practices of the State, with respect to segregation on a racial basis in recreational facilities.

The policies and practices of the Appellants have become established over the years and have the force of law under both State and Federal judicial interpretations. *Durkee v. Murphy, supra,* and *Boyer v. Garrett, supra.* It was conceded in the District Court and on appeal to the Court of Appeals for the Fourth Circuit that the policies and practices of the administrative bodies of the State and City supervising the recreational facilities involved constitute an exercise of legislative power, in that the policies and practices had become accepted as rules and regulations with the force of law in the State of Maryland. On this matter, the District Judge, in his opinion (123 Fed. Supp. 193, at pages 195-196) made the following findings:

(As to the State of Maryland)

"* * * The facilities at Sandy Point State Park aside from the bathing beaches and bath houses, are entirely unsegregated, but the Commission has provided separate bathing beaches and bath houses for whites and Negroes, by rules and regulations adopted by the Com-

mission in the exercise of its administrative powers. * * *

(As to the City of Baltimore)

"* * * Over the years the Board of Recreation and Parks has made and modified various rules and regulations dealing with segregation in the public parks. At the present time no parks, as such, are segregated, but certain recreational facilities, including the bathing beaches, the swimming pools, some tennis courts and fields for competitive sports, and some playgrounds and social activities are operated on a segregated basis."

That these regulations and rules, which were enforced against the Appellees in the instant proceedings, are State actions with the force of law, has been agreed and, indeed, the present proceedings were brought on the premise that they have such effect. The proceeding was designed to obtain a judicial determination that the actions were constitutionally invalid.

Like most such well established and defined policies, which are known and accepted by the public over a long period of years, no explicit restatement of the rules and regulations enforced as respects segregation at public recreational facilities has been made in recent years. As was pointed out by the Court of Appeals of Maryland in the *Durkee v. Murphy* case, 181 Md. 259, 29 A. 2d 253 at p. 265:

"* * * Many statutory provisions recognize this need, and the fact needs no illustration. 'Separation of the races is normal treatment in this State.' *Williams v. Zimmerman*, 172 Md. 563, 567, 192 A. 353, 355. No additional ordinance was required therefore to authorize the Board to apply this normal treatment; the authority would be an implied incident of the power expressly given."

In each instance, jurisdiction of the recreational facilities herein concerned is committed to the care of the Appellants. As to State facilities, jurisdiction over recreational facilities, including bathing beaches and bathhouses for the benefit of citizens and residents of the State of Maryland, is expressly committed to the Commission of Forests and Parks of Maryland by the provisions of Article 66C, Sections 340, et seq. of the Annotated Code of Maryland (1951 Ed.). The duty of operation, maintenance and supervision of Sandy Point State Park and Beach falls within this express supervisory authority. There is, as an adjunct to the power to supervise, the express power to promulgate rules and regulations with respect to use, availability and admission to Sandy Point State Park and Beach.

As to the municipal authorities, the Mayor and City Council of Baltimore is expressly authorized, under Article XIA of the Constitution of Maryland, and Section 6(19) of the Charter and Public Local Laws of Baltimore (1949 Ed.), to establish and supervise bathing beaches, bath houses and other recreational facilities for the benefit of the citizens and residents of the City of Baltimore. By the terms and provisions of Section 96 of the Charter and Public Local Laws of Baltimore City (1949 Ed.), the Board of Recreation and Parks of Baltimore, an instrumentality of the City, is authorized to exercise the City's power of supervision and control over the operation of bathing beaches and recreational facilities.

The acts of the Appellants under the legislative powers delegated to them are under attack in this case. That the municipal and State agencies have expressly acted under proper authority and in a manner giving their actions the force of law is apparent.

As will be hereinafter more fully set out, the District Court sustained the actions of the agencies, municipal and State, on the ground that the objectives sought to be obtained were proper governmental objectives and the regulations were in and of themselves reasonable. In reversing the District Court, the Fourth Circuit Court of Appeals expressly found that the legal basis of the rules and regulations before the District Court had been swept away by this Court's decision in the School Segregation Cases (*Brown v. Board of Education*, 347 U.S. 492; *Bolling v. Sharpe*, 347 U.S. 497 and consolidated opinion in the cases reported at 99 L. Ed. 653). It is therefore apparent that State statutes within the meaning of that term have been squarely ruled unconstitutional as contrary to the Fourteenth Amendment to the Constitution of the United States, and, accordingly, this Court should take jurisdiction.

STATEMENT OF FACTS (Lonesome Case)

Appellants, members of the Commission of Forests and Parks of Maryland, are empowered, under Article 66C, Sections 340, *et seq.*, of the Annotated Code of Maryland (1951 Ed.), to establish and supervise recreational facilities, including bathing beaches and bathhouse facilities for the benefit of the citizens and residents of the State of Maryland. Pursuant to such authority, Appellants have established and are maintaining and operating bathing and recreational facilities. They are charged with the duty of maintaining, operating and supervising Sandy Point State Park and Beach as a part of their supervisory control and authority. They have the exclusive power to promulgate rules and regulations with respect to use, availability and admission to Sandy Point State Park and Beach. The Appellants had, prior to July 4, 1952, by administrative regulation, pro-

vided for racial segregation in the use of the bathhouses and beaches at Sandy Point.

On July 4, 1952, the Appellees sought the use of these facilities and were denied admission to the South Beach at Sandy Point Beach and Park and were directed to use the East Beach which was set aside for the exclusive use of Negroes.

In August, 1952, Appellees, adult and minor Negroes, brought suit in the U.S. District Court for the District of Maryland, against the Appellants and the Superintendent of the Sandy Point State Park and Beach to restrain the Appellants from operating the bathhouses and bath facilities at Sandy Point State Beach on a racially segregated basis, and for declaratory relief. Appellees alleged that the facilities afforded Negroes were not equal to those afforded whites and they had been denied admission to the facilities reserved for whites solely because of their race or color. Appellants answered denying that the facilities were not substantially equal.

On June 4, 1953, following a hearing on Appellees' motion for a preliminary injunction, Judge W. Calvin Chesnut entered an Order in which he found that the South Beach facilities (for whites) were superior to those at East Beach (for Negroes), and restrained Appellants from excluding any person, solely on account of race and color, from the facilities at South Beach.

On July 1, 1953, having improved the facilities at East Beach, Appellants moved to vacate the preliminary injunction. After a hearing, Judge Chesnut entered an Order on July 9, 1953, in which he found as a fact that as of the date of said hearing, the bathing facilities at East Beach were at least equal to those at South Beach, and he vacated

and struck out the preliminary injunction theretofore granted, with the right to the Appellees to renew their motion at any time the facilities at South Beach and East Beach might not be in substantial equality.

In June, 1954, following the opinion of the Supreme Court in the School Segregation Cases, Appellees moved for judgment on the pleadings. The case was consolidated with the case of *Dawson et al. v. Mayor and City Council of Baltimore*, and *Isaacs et al. v. Mayor and City Council of Baltimore*. On June 18, 1954, it was stipulated and agreed by and between the parties in this case that the bathhouse and beach facilities at Sandy Point were physically equal at that time. On July 27, 1954, after a hearing on the motion for judgment on the pleadings, the motion was denied by Judge Roszel C. Thomsen, United States District Judge for the District of Maryland, and final judgments were entered pursuant thereto on August 25, 1954. The case was appealed together with the *Dawson* case to the United States Court of Appeals for the 4th Circuit, and on March 14, 1955, following a hearing, the United States Court of Appeals reversed the District Court in a per curiam opinion.

The case is now brought by appeal to this Court.

STATEMENT OF FACTS (Dawson Case)

The Appellants, Mayor and City Council of Baltimore, a body corporate, incorporated under the Laws of the State of Maryland, have power to establish and supervise bathing beaches and bathhouse facilities and other recreational facilities for the benefit of the citizens and residents of the City pursuant to authority vested under Article XIA of the Constitution of Maryland, Section 6(19), Charter and Public Local Laws of Baltimore (1949 Ed.). Appellants, James C. Anderson, et al., are members of the Board

of Recreation and Parks of Baltimore, an instrumentality of the City of Baltimore, with authority to maintain, supervise and control the operation of bathing beaches and other recreational facilities maintained by the City pursuant to authority vested under Section 96 of the Charter and Public Local Laws of Baltimore City. Appellant, Sun and Sand, Inc., a body corporate, incorporated under the Laws of the State of Maryland, is a lessee of the Appellant, the Board of Recreation and Parks, and operates its concession under the supervision and control of the Board of Recreation and Parks in order to add to the comfort, convenience and pleasure of those persons using the facilities available at Fort Smallwood Park.

Pursuant to municipal authority set forth in Section 96 of the Baltimore City Charter, Appellants have established and are maintaining and operating bathing and recreational facilities at Fort Smallwood Park, a public facility which is supported out of public funds and operated by the City to afford recreational facilities to the citizens and residents of Baltimore.

As a part of their supervisory control and authority, with respect to Fort Smallwood Park, the Board of Recreation and Parks of Baltimore is clothed and vested with the exclusive power to promulgate rules and regulations with respect to the use, availability and admission to said Fort Smallwood Park to the persons who desire to use it.

On July 3, 1950 and August 10, 1950, Appellees sought to use the facilities at Fort Smallwood and were denied the use of the bathing and bathhouse facilities as a result of the policy of racial segregation pursued by the Department of Recreation and Parks.

Appellees filed suit in the United States District Court for the District of Maryland and on April 6, 1951, the Court, for the reason that no facilities were made available to the Appellees as Fort Smallwood, enjoined the Appellants from excluding the Appellees from those recreational facilities. During the summer of 1951, by order of the Board of Recreation and Parks, Negroes exclusively used the facilities at Fort Smallwood on certain days, while white persons used them on other days.

On January 25, 1952, the Board of Recreation and Parks formally voted to establish separate bathhouse and beach facilities for the exclusive use of Negroes at Fort Smallwood Park and reserved the original bathhouse and beach facilities for the exclusive use of white persons. Separate bathhouses and beaches for Negroes were constructed at Fort Smallwood Park in 1952 and Negroes were admitted exclusively to such facilities and white persons to the original facilities.

In accordance with the right reserved to the Appellees by the Court, the Appellees renewed the proceedings on September 16, 1952. On June 18, 1954, following a motion made by the Appellees for judgment on the pleadings, a stipulation was entered into whereby it was agreed by and between the parties that the separate facilities at Fort Smallwood Park were physically equal at that time. The case was consolidated with the case of *Lonesome et al. v. Maxwell et al.* and *Isaacs v. Mayor and City Council,* and following a hearing on the motion for judgment on the pleadings, the motion was denied on July 27, 1954 by Roszel C. Thomsen, Judge of the United States District Court for the District of Maryland, and final judgment entered. Ap-

pellees appealed the *Lonesome* and *Dawson* cases to the United States Court of Appeals for the 4th Circuit and the Court of Appeals reversed the District Court in a per curiam opinion. The case is brought to this Court on appeal from the United States Court of Appeals.

THE QUESTIONS ARE SUBSTANTIAL

This case, and the issues posed thereby, are of vital social, economic and psychological importance both in the State of Maryland and in other States of the Union in which segregation of races is the accepted rule. Much of the social and economic life of the State of Maryland, as well as of other States similarly situated, is founded upon the doctrine of "separate but equal" facilities laid down by this Court in *Plessy v. Ferguson*, 163 U.S. 537. The social acceptance of this decision, and the development of the social structure of the State upon this foundation, cause the implications of the recent decisions of this Court in the School Segregation Cases (*Brown v. Board of Education of Topeka*, 347 U.S. 483; *Bolling v. Sharpe*, 347 U.S. 497 and consolidated opinion in the case reported at 99 L. Ed. 653) to be of great importance. It is necessary that the State and its citizens have a clear definition not only of what the School Segregation Cases do hold, but it is equally important that they be advised what the School Segregation Cases do *not* hold.

The School Segregation Cases have given rise to concerted efforts to expand this Court's decisions into fields of activity not reasonably comprehended within the terms of the decisions. The decisions have furnished a springboard from which attacks have been launched upon other areas of State and municipal action not fairly within this Court's decisions, and have caused uncertainty and indecision on the part of State and Municipal officers caught between

emotional and psychological pressures from the people of the State whose lives have been lived under the "separate but equal" doctrine, and an earnest desire on the part of the same State and Municipal officers to see that Constitutional guarantees of all persons in the State are protected. This case, therefore, furnishes the opportunity for this Court to fairly acquaint the officers of the municipality and the State of Maryland, as well as of other States similarly situated, with some guideposts to aid them in the solution of the difficult legal, psychological and social problems which presently confront them.

The Commission of Forests and Parks of the State of Maryland, which operates Sandy Point State Park, under the authority of Sections 340, *et seq.*, of Article 66C of the Annotated Code of Maryland (1951 Edition), by rules and regulations adopted in the exercise of its administrative powers, operates the facilities at Sandy Point on a non-segregated basis except as respects the bathing facilities, including the bathhouses. This is in accordance with the long-standing policy which has existed in the State of Maryland that separation of races is normal treatment in the State. *Williams v. Zimmerman*, 172 Md. 563, 567, 192 Atl. 353, 355; *Durkee v. Murphy*, 181 Md. 259, 29 Atl. 2d 253. There is no doubt that in so far as this policy was applied in the past to public educational facilities, the recent decisions in the School Segregation Cases have set the pattern for the elimination of the policy in public education. The issue presently posed to this Court, however, is whether the School Segregation decisions are broader in scope than they are in language. It is submitted that in vital and sensitive areas, such as that involved in the present case, State officers should not be left to grope and wonder as to the scope and application of this Court's decision.

Plessy v. Ferguson, supra, found application generally in many fields including, until the recent decisions, the field of public education. That *Plessy v. Ferguson, supra,* received express recognition in the field of recreational facilities in the State of Maryland is apparent upon examination of the cases. *Law v. Mayor and City Council of Baltimore,* (D.C.-Md. 1948), 78 Fed. Supp. 346; *Boyer v. Garrett* (D.C.-Md. 1949), 88 Fed. Supp. 353, 183 Fed. 2d 582; *Durkee v. Murphy, supra; Williams v. Zimmerman, supra.*

The issue as to the scope and extent of this Court's opinions in the School Segregation Cases is cleanly posed in this case. The trial court in these cases expressly ruled, in view of the stipulated fact that the recreational facilities in question were in fact physically equal, that this Court's decision in the School Segregation Cases had no application to the field of recreational facilities. The Court of Appeals for the Fourth Circuit, in a per curiam opinion, held that cases theretofore controlling, to wit, *Durkee v. Murphy, supra; Boyer v. Garrett, supra;* and *Plessy v. Ferguson, supra,* had been overruled and the authority of the cases swept away by subsequent decisions of this Court. The authorities cited were: *McLaurin v. Oklahoma Board of Regents,* 339 U.S. 637 (Graduate School Case); *Henderson v. U. S.,* 339 U.S. 816 (Railway Dining Car Case); *Brown v. Board of Education, supra;* and *Bolling v. Sharpe, supra* (School Segregation Cases). The Court of Appeals held that these authorities, although not by terms applicable to the field of public recreation, overruled former express opinions which sustained the doctrine of "separate but equal" in the public recreation field. The apparent basis of the decision was that in addition to tangible factors, in any case involving "separate but equal" treatment of races, psychological factors must be taken into consideration. On

that basis, and on that basis alone, the Court of Appeals for the Fourth Circuit held segregation in recreational facilities an improper exercise of the police power of the State.

It is respectfully submitted that the opinions of this Court in the School Segregation Cases are not fairly susceptible of interpretation to exclude *in every field* of State activity the doctrine of "separate but equal". If *Plessy v. Ferguson, supra,* has been so narrowed as to be totally disregarded by virtue of importing into every case of "separate but equal" facilities the psychological problems which are necessarily inherent in such situations, that legal doctrine should be clearly expressed and not raised by inference out of a decision not, by its terms, applicable.

It would be presumptuous on the part of the Appellants to attempt to define to this Court what was intended by the language of the Court in the School Segregation opinions. It seems necessary, however, that the Appellants point out that it is incumbent upon their State and Municipal officers to interpret the sweep and application of the opinions, and that a reading thereof indicates that the "separate but equal" doctrine has *not* been abolished, but that there has been exempted from it the area of public education. The opinions constitute a subtraction from the doctrine and not an overruling of the doctrine.

This Court has had innumerable opportunities to sweep aside *Plessy v. Ferguson, supra.* Indeed in the course of argument of the public education cases, there was presented argument and authority for discarding the entire concept. That this Court carefully chose to leave the doctrine, but subtracted from it one area to which it formerly applied, is apparent from the decision. The express ground for the decision in the School Segregation Cases is set down

in the opinion of this Court found in 347 U.S. 493, where this Court said:

> "We conclude that *in the field of public education* the doctrine of 'separate but equal' has no place. *Separate educational facilities are inherently unequal.*" (Emphasis supplied.)

This ruling was expressly based on the equal protection of the laws guaranteed by the Fourteenth Amendment, and the Court declined to discuss whether segregation violated the Due Process Clause of the Fourteenth Amendment. 347 U.S. at 494, 495.

In this case, the physical equality of the facilities furnished is conceded. The psychological and social impact of segregation, which was the vital element in this Court's decision in the public school cases, does not appear. While the Appellants agree with the language of this Court in *Bolling v. Sharpe*, 347 U.S. 497: "Classification based upon race must be scrutinized with particular care * * *", nevertheless, it should be noted that this Court made its determination in the *Bolling* case (based upon the Due Process Clause) dependent upon a finding that segregation *in public education* "is not reasonably related to any proper Governmental objective * * *." This Court pointed out in *Koramatsu v. U. S.*, 323 U.S. 214, 216, "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. This is not to say that all such restrictions are unconstitutional. It is to say that the courts must subject them to the most rigid scrutiny".

The Appellants submit that while it may be appropriate to examine closely the policy of segregation in public recreational facilities, there is in this case a proper Governmental objective to be served. This Court had not gone so

far as to hold that the Governmental objectives upon which the Appellants' action was based are not proper Governmental objectives. As the Court of Appeals of Maryland pointed out in *Durkee v. Murphy, supra*, one objective subserved by racial separation in public recreational facilities is the avoidance of any possible conflicts which might arise from racial antipathies. This statement is not intended to defend or condone the existence of such a state of mind, but ignoring the facts will not aid in solution of the problem. Human relations, which have been brought into the field of the law where segregation matters are concerned, do not always respond exactly as the informed, intelligent element of society might think proper. While we decry the existence of the fact, this is different from ignoring the existence of the fact. The prevention of race conflict by proper State action in fields where the "separate but equal" doctrine applies will do much to aid in the acceptance of non-discrimination in those fields where constitutional guarantees require the abandonment of the "separate but equal" theory.

Elimination of segregation in public education, peacefully and properly handled, will doubtless do much to help in the solution of this matter. The fact is, however, that it is the duty of the State and its municipalities to maintain tranquil relations so that non-discrimination in the schools may prosper under the most favorable possible circumstances. Social change comes slowly, and precipitous action in fields not within the scope of this Court's ruling should not be permitted to occur on the basis of an inference, with possible harmful consequences to the end to be attained under the former opinions.

Another objective sought to be obtained is that public facilities furnish the greatest good to the greatest number

of citizens of the State, both Negro and white. Under the social structure, and at the present stage of social development in the State, whites and Negroes can better use and more enjoy recreational facilities with members of their own race than in mixed groups. This objective, to provide facilities for the greatest number and in accordance with the wishes of the greatest number, is not unreasonable. Obviously, the State and City cannot seek to attain the end by a means which works a deprivation of constitutional rights. We submit, however, that feeling and emotion in the State of Maryland, and doubtless in other Southern States, run higher in inter-mixing of races in bathing facilities than possibly any other field of human relations except miscegenation.

Maryland has been in the forefront of the States seeking to level racial differences. The State has moved steadily ahead in the accomplishment of the desired end of breaking down improper barriers based on race. It would be tragic, however, to undo the enlightened and progressive approach evidenced by the State of Maryland by forcing the issue where the objectives are proper in light of the circumstances. Here, the State and City have reasonable cause to believe that consequences undesirable to both Negro and white citizens may arise out of integrated recreational facilities. To avoid and prevent those consequences, and to permit the development of the State and City programs on logical bases, the State should certainly be accorded the opportunity to take those steps reasonably designed to prevent inter-racial tension and make available its recreational facilities to the largest number of its citizens. Here, reasonable Governmental objectives exist, implemented by reasonable regulations, and they should not be upset.

There is here involved not only a question of whether the State's statutes should be denounced as violative of constitutional guarantees, but also the nature of the relief which should be granted. As this Court demonstrated by its approach in the School Segregation Cases, moderation and steady progress are more desirable than abrupt change which may redound only to the injury of citizens of both races. The issue has also been posed in this case whether, if this Court deems the School Segregation Cases applicable to public recreation, the remedy should be immediate desegregation or some other form of relief under the equity jurisdiction of the local courts, who are familiar with conditions as they exist in the State. We submit that no further authority to sustain the desirability of this sensible approach need be cited than this Court's second opinion in the School Segregation Cases. (*Brown v. Board of Education of Topeka etc.*, 99 L. Ed. 653). Timing is of vital importance to the State, the City and their officers. Lack of knowledge by such officers as to the manner of effectuating desegregation, if such be necessary, would be dangerous. Certainty, and assurance that they are acting under and pursuant to law, will do much to aid in the solution of the knotty problem of *how* to carry out any decree of this Court, if desegregation of recreational facilities should be required.

We, therefore, respectfully submit that the questions here presented could not be more vital, significant and substantial, and that the cases should, accordingly, be heard and resolved by this Court.

ALTERNATE CERTIORARI APPLICATION

Appellants are also applying for certiorari with respect to the same judgment. They believe that the Supreme Court of the United States has jurisdiction over this appeal. If, however, in this they are mistaken, it is requested that writ of certiorari be granted. *Bradford Electric Light Co. v. Clapper*, 284 U.S. 221, 52 S. Ct. 118, 76 L. Ed. 254.

Respectfully submitted,

C. FERDINAND SYBERT,
Attorney General of Maryland,

NORMAN P. RAMSEY,
Deputy Attorney General of Maryland,

AMBROSE T. HARTMAN,
Asst. Attorney General of Maryland,

THOMAS N. BIDDISON,
City Solicitor of Baltimore,

EDWIN HARLAN,
Deputy City Solicitor of Baltimore,

HUGO RICCIUTI,

FRANCIS X. GALLAGHER,
Assistant City Solicitors,
Attorneys for Appellants.

APPENDIX A

United States Court of Appeals
For the Fourth Circuit

No. 6903

Robert M. Dawson, Jr., et al.,
Appellants,

versus

Mayor and City Council of Baltimore City, James C. Anderson, President, et al.,
Appellees.

No. 6904

Milton Lonesome, et al.,
Appellants,

versus

R. Brooke Maxwell, Chairman, Bernard I. Gonder, H. Lee Hoffman, Sr., J. Miles Lankford, J. Wilson Lord, constituting the Commissioners of Forests and Parks of Maryland, et al., Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore

(Argued January 11, 1955. Decided March 14, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

PER CURIAM:

These appeals were taken from orders of the District Court dismissing actions brought by Negro citizens to ob-

tain declaratory judgments and injunctive relief against the enforcement of racial segregation in the enjoyment of public beaches and bathhouses maintained by the public authorities of the State of Maryland and the City of Baltimore at or near that city. Notwithstanding prior decisions of the Supreme Court of the United States striking down the practice of segregation of the races in certain fields, the District Judge, as shown by his opinion, (123 F. Supp. 193) did not feel free to disregard the decision of the Court of Appeals of Maryland in *Durkee v. Murphy*, 181 Md. 259, and the decision of this court in *Boyer v. Garrett*, 4 Cir., 183 F. 2d 582. Both of these cases are directly in point since they related to the field of public recreation and held, on the authority of *Plessy v. Ferguson*, 163 U. S. 537, that segregation of the races in athletic activities in public parks or playgrounds did not violate the 14th Amendment if substantially equal facilities and services were furnished both races.

Our view is that the authority of these cases was swept away by the subsequent decisions of the Supreme Court. In *McLaurin v. Okla. State Regents*, 339 U. S. 637 the Supreme Court had held that it was a denial of the equal protection guaranteed by the Fourteenth Amendment for a state to segregate on the ground of race a student who had been admitted to an institution of higher learning. In *Henderson v. United States*, 339 U. S. 816, segregation on the ground of race in railway dining cars had been held to be an unreasonable regulation violative of the provisions of the Interstate Commerce Act. Subsequently, in *Brown v. Board of Education*, 347 U. S. 483, segregation of white and colored children in the public schools of the state was held to be a denial of the equal protection clause of the 14th Amendment; and in *Bolling v. Sharpe*, 347 U. S. 497, segregation in the public schools of the District of Columbia was held to be violative of the due process clause of the Fifth Amendment. In these cases, the "separate but equal" doctrine adopted in *Plessy v. Ferguson*, was held to have no place in modern public education.

The combined effect of these decisions of the Supreme Court is to destroy the basis of the decision of the Court of Appeals of Maryland in *Durkee v. Murphy*, and the decision of this court in *Boyer v. Garrett*. The Court of Appeals of Maryland based its decision in Durkee v. Murphy on the theory that the segregation of the races in the public parks of Baltimore was within the power of the Board of Park Commissioners of the City to make rules for the preservation of order within the parks; and it was said that the separation of the races was normal treatment in Maryland and that the regulation before the court was justified as an effort on the part of the authorities to avoid any conflict which might arise from racial antipathies.

It is now obvious, however, that segregation cannot be justified as a means to preserve the public peace merely because the tangible facilities furnished to one race are equal to those furnished to the other. The Supreme Court expressed the opinion in *Brown v. Board of Education*, 347 U. S. 492 to 494, that it must consider public education in the light of its full development and its present place in American life, and therefore could not turn the clock back to 1896 when *Plessy v. Ferguson* was written, or base its decision on the tangible factors only of a given situation, but must also take into account the psychological factors recognized at this time, including the feeling of inferiority generated in the hearts and minds of Negro children, when separated solely because of their race from those of similar age and qualification. With this in mind, it is obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State; for if that power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities, the use of which is entirely optional.

The decision in *Bolling v. Sharpe* also throws strong light on the question before us for it admonishes us that in

approaching the solution of problems of this kind we should keep in mind the ideal of equality before the law which characterizes our institutions. The court said (pp. 499-500):

"Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. As long ago as 1896, this Court declared the principle 'that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, descrimination by the General Government, or by the States, against any citizen because of his race.' And in *Buchanan v. Warley*, 245 U. S. 60, the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

Reversed.

APPENDIX A

United States District Court

District of Maryland

Filed July 27, 1954

Civil Action—No. 5965

Milton Lonesome, et al.

vs.

R. Brooke Maxwell, et al.

Civil Action—No. 5847

Robert M. Dawson, Jr., et al.

vs.

Mayor and City Council of Baltimore, et al.

Civil Action—No. 6879

Charles H. Isaacs, et al.

vs.

Mayor and City Council of Baltimore, et al.

THOMSEN, District Judge—

The motions for judgments on the pleadings in these three cases raise a single legal question: Does segregation of the races by the State of Maryland and the City of Baltimore at public bathing beaches, bathhouses and swimming

pools deny plaintiffs any rights protected by the Fourteenth Amendment.

No. 5965

In this case, filed in August, 1952, plaintiffs, adult and minor Negroes, brought suit against the Commissioners of Forests and Parks of the State of Maryland, and the Superintendent of Sandy Point State Park and Beach, to restrain defendants from operating the bathhouses and bathing facilities at Sandy Point State Park on a segregated basis. Plaintiffs alleged that the facilities afforded Negroes were not equal to those afforded whites and that they had been denied admission to the facilities reserved for whites solely because of their race or color. Defendants answered, denying that the facilities were not substantially equal.

On June 4, 1953, following a hearing on plaintiffs' motion for a preliminary injunction, Judge Chesnut entered an order in which he found that the South Beach facilities (for whites) were superior to those at East Beach (for Negroes), and restrained defendants from excluding any person, solely on account of race and color, from the facilities at South Beach. On July 1, 1953, having improved the facilities at East Beach, defendants moved to vacate the preliminary injunction. After a hearing Judge Chesnut entered an order on July 9, 1953 in which he found as a fact that as of the date of said hearing the bathing facilities at East Beach were at least equal to those at South Beach, and vacated and struck out the preliminary injunction theretofore granted, with the right to plaintiffs to renew their motion at any time the facilities at South Beach and East Beach may not be in substantial equality.

No. 5847

In this case, filed in May, 1952, plaintiffs, adult and minor Negroes, are suing the City of Baltimore, its Board of Recreation and Parks, the Director of the Bureau of Recreation and Parks, and Sun and Sand, Inc., a corporation which operates a concession under the supervision and con-

trol of that Board at Fort Smallwood Park, to restrain defendants from operating the bathhouses and bathing facilities at Fort Smallwood Park on a segregated basis, alleging that the facilities afforded Negroes are not equal to those afforded whites, and that they were denied admission to the facilities reserved for whites solely because of their race or color. Defendants answered, denying that the facilities are not substantially equal.

No. 6879

In this case, filed in September, 1953, plaintiffs seek to restrain defendants from operating on a segregated basis any swimming pool established, operated and maintained by the City of Baltimore. Defendants are the City, its Board of Recreation and Parks, the Director of the Department of Recreation and Parks, and the Superintendent of Parks and Pools. One of the plaintiffs is white; all the rest of the plaintiffs are Negroes. Plaintiffs allege that the bathing facilities which defendants provide for Negroes are not equal to those provided for white persons. Plaintiffs also allege that defendants, by operating the facilities on a segregated basis, deny plaintiffs the right to associate with their friends. Defendants answered that the facilities afforded Negroes are substantially equal to those afforded white persons, and that any denial of use of the bathing facilities which plaintiffs may have experienced was a result of the enforcement of rules and regulations establishing a policy of segregation in the use of bathing facilities in the public parks of Baltimore City.

In all of the cases further proceedings were delayed pending the decision of the Supreme Court in the school segregation cases.

Several days after the filing of the opinion in *Brown v. Board of Education*, (May 17, 1954) 347 U. S. 483, counsel for plaintiffs asked this Court to set these three cases for prompt hearing. Counsel for defendants offered no objection, and the court set the hearings for June 22, 1954. Thereafter, on May 29, 1954, plaintiffs filed a motion for judg-

ment on the pleadings in each of the three cases, asserting in each case: (1), that the complaint alleges a violation of plaintiffs' constitutional rights in that defendants require racial segregation in the facilities which are the subject of this action; (2) that the answer admits that defendants exclude plaintiffs from these state-(city)-operated facilities to which they sought admission, solely because of their race; and (3) that such racial segregation violates the Fourteenth Amendment to the United States Constitution. The respective defendants filed answers to these motions, denying that their actions violate the Fourteenth Amendment.

At a pre-trial conference counsel for all parties in No. 5847 (the Fort Smallwood Bathing Beach case) stipulated "that the separate facilities in question herein are physically equal at this time." A similar stipulation was filed in No. 5965 (the Sandy Point Bathing Beach case). Counsel in No. 6879 (the case involving the city swimming pools) stipulated "that the only question to be argued at this hearing is the broad question of the right of the City to segregate the races in public swimming pools. Any other question raised by the pleadings is reserved for argument at some future time, if necessary."

Sandy Point State Park is operated administratively by the Commission of Forests and Parks of the State of Maryland under the authority of Sec. 340 et seq., Article 66C, Annotated Code of Maryland (1951 Ed.). The law does not require the Commission to operate a bathing beach in a segregated or non-segregated manner; nor indeed does it require the Commission to operate any bathing beach at all. The facilities at Sandy Point State Park, aside from the bathing beaches and bathhouses, are entirely unsegregated, but the Commission has provided separate bathing beaches and bathhouses for whites and Negroes, by rules and regulations adopted by the Commission in the exercise of its administrative powers. It was stated at the hearing, without objection or contradiction, that the bathhouses and bathing beaches at Sandy Point are the only segregated

facilities under the control of the Commission of Forests and Parks of the State of Maryland.

Section 6, Sub-section 19, Baltimore City Charter grants the Mayor and City Council of Baltimore power to establish, maintain, control and regulate parks, squares and municipal recreational facilities; Section 96 of said Charter gives the Board of Recreation and Parks authority to regulate and control the use of recreational facilities in the public parks of Baltimore. Neither the Constitution of Maryland, the City Charter, nor any statute or ordinance requires the Board of Recreation and Parks to operate the bathing, swimming and other recreational facilities on a segregated or unsegregated basis. Over the years the Board of Recreation and Parks has made and modified various rules and regulations dealing with segregation in the public parks. At the present time no parks, as such, are segregated, but certain recreational facilities, including the bathing beaches, the swimming pools, some tennis courts and fields for competitive sports, and some playgrounds and social activities are operated on a segregated basis. Effective July 10, 1951, the Board of Recreation and Parks set aside for interracial play certain athletic and recreational facilities in a number of parks. Counsel agreed at the hearing that a list of these facilities be made a part of the record, and they are referred to later in this opinion.

The authority of the respective boards to make the regulations which are challenged in these cases is supported by *Durkee v. Murphy*, (1942), 181 Md. 259, a case involving the segregation of white and Negro players on municipal golf courses. In that case Chief Judge Bond, after referring to the relevant sections of the Baltimore City Charter of 1938 (not substantially different from those of the present Charter of 1946) which conferred powers upon the Park Board to make rules and regulations, said:

> "And these provisions must, we conclude, be construed to vest in the Board the power to assign the golf courses to the use of the one race and the other in an effort to avoid any conflict which might arise from

racial antipathies, for that is a common need to be faced in regulation of public facilities in Maryland, and must be implied in any delegation of power to control and regulate. There can be no question that, unreasonable as such antipathies may be, they are prominent sources of conflict, and are always to be reckoned with. Many statutory provisions recognize this need, and the fact needs no illustration. 'Separation of the races is normal treatment in this state.' *Williams v. Zimmerman*, 172 Md. 563, 567, 192 A. 353, 355. No additional ordinance was required therefore to authorize the Board to apply this normal treatment; the authority would be an implied incident of the power expressly given." 181 Md. at 265.

Plaintiffs question whether the statement "separation of the races is normal treatment in this state" is still true, but do not question the power of the respective boards to make such regulations except as they may be prohibited by the Fourteenth Amendment to the Constitution of the United States.

The court has consistently held, following *Plessy v. Ferguson*, 163 U. S. 537, that segregation of races with respect to recreational facilities afforded by the State for its citizens is within the constitutional exercise of the police power of the State, provided the separate facilities afforded different races are substantially equal. *Law v. Mayor & City Council of Baltimore*, (D. C. Md. 1948) 78 F. Supp. 346; *Boyer v. Garrett*, (D. C. Md. 1949) 88 F. Supp. 353.

Boyer v. Garrett was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed this court, 183 F. 2d 582, saying:

> "The contention of plaintiffs is that, notwithstanding this equality of treatment, the rule providing for segregation is violative of the provisions of the federal Constitution. The District Court dismissed the complaint on the authority of Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256; and the principal argu-

ment made on appeal is that the authority of Plessy v. Ferguson has been so weakened by subsequent decisions that we should no longer consider it as binding. We do not think, however, that we are at liberty thus to disregard a decision of the Supreme Court which that court has not seen fit to overrule and which it expressly refrained from reexamining, although urged to do so, in the very recent case of Sweatt v. Painter, 70 S. Ct. 848. It is for the Supreme Court, not us, to overrule its decisions or to hold them outmoded."

Certiorari was denied by the Supreme Court, 340 U. S. 912.

That decision of the Court of Appeals for the Fourth Circuit is binding on this court in this case unless the basis for the decision of the Court of Appeals has been swept away by subsequent decisions of the Supreme Court.

Brown v. Board of Education certainly reexamined the decision in *Plessy v. Ferguson*. Did it overrule that decision, or establish any principle which makes it clear that the "separate but equal" doctrine of *Plessy v. Ferguson* may no longer be applied to authorize the provision by a state of separate but equal recreational facilities? If it did, this court must follow the Supreme Court rather than the Court of Appeals for the Fourth Circuit. On the other hand, if *Brown v. Board of Education*, aside from its obvious effect in the field of education, merely shows which way the wind is blowing, and foretells the ultimate and perhaps imminent elimination of the "separate but equal" doctrine in recreation, transportation and other fields besides education, this court is still bound by the decision of the Fourth Circuit in *Boyer v. Garrett*.

It is therefore necessary to analyze the opinion in *Brown v. Board of Education* and to try to determine, with such additional light as may be thrown on the matter by other decisions of the Supreme Court, whether *Brown v. Board of Education* was intended to wipe out the "separate but equal" doctrine entirely.

The opinion in *Brown v. Board of Education* discussed the history of the Fourteenth Amendment with respect to segregated schools; observed that in the first cases in the Supreme Court construing the Fourteenth Amendment the Court interpreted it as proscribing all state imposed discrimination against the Negro race; and noted the appearance of the "separate but equal doctrine" in *Plessy v. Ferguson* and the subsequent history of that doctrine in the Supreme Court. The Court stated that its decision could not turn on merely tangible factors, but that the Court must look to the effect of segregation itself on public education. The Court noted a number of factors which show that education is perhaps the most important function of state and local governments. Reference will be made to these factors later in this opinion. The Court stated that the question presented was: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" (347 U.S. 493) Answering that question in the affirmative, the court said:

> "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
>
> " 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has tendency to retard the educational and mental development of Negro children and

to deprive them of some of the benefits they would receive in a racially integrated school system.'

"Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment." 347 U.S. at 494, 495.

What "language in *Plessy v. Ferguson*" was the Supreme Court rejecting as contrary to "this finding," i.e. the finding in the Kansas case quoted by the Supreme Court in the foregoing extract from its opinion?

The heart of *Plessy v. Ferguson* lies in the following paragraph, which was quoted by Judge Chesnut as the basis for his decision in *Boyer v. Garrett:*

"The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the ex-

ercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced." 163 U.S. at 544.

It is clear that *Brown v. Board of Education* overruled the implied approval of segregation in the field of education contained in the foregoing quotation from *Plessy v. Ferguson*. It appears also that the Supreme Court now disagrees with the general statement in *Plessy v. Ferguson* that "laws permitting, and even requiring, their separation in places where they are liable to be brought into contract do not necessarily imply the inferiority of either race to the other." The question of what matters fall within the field of "social equality" has never been clear. *Brown v. Board of Education* indicates that certain claimed rights which may have been heretofore regarded as social matters should now be considered civil rights entitled to constitutional protection. But has the "separate but equal" doctrine been completely overruled? May it still be applied in the field of transportation? May it still be applied in the field of recreation? *Brown v. Board of Education* did not expressly overrule all of *Plessy v. Ferguson* nor say that the "separate but equal" doctrine may not be applied in the fields of transportation or recreation. This court must consider the force and extent of the implications of the decision in *Brown v. Board of Education*.

Counsel for plaintiffs in the cases at bar have noted that the psychological and sociological authorities cited by the Supreme Court in *Brown v. Board of Education* deal with all fields of segregation and not alone with segregation in education. It is true that the authorities cited would have supported a broader conclusion than the conclusion stated by the Court. The narrowness of the actual decision may have been due to the policy of the Supreme Court to decide constitutional questions only when necessary to the dis-

position of the case at hand, and to draw such decisions as narrowly as possible. *Sweatt v. Painter*, 339 U. S. 629, 631; *Rescue Army v. Municipal Court*, 331 U. S. 549, and cases cited therein. On the other hand it may be that the decision was worded as it was because the Supreme Court did not intend to rule that the "separate but equal" doctrine can no longer be applied in fields other than education.

Let us see what light is thrown on the matter by decisions of the Supreme Court in cases decided after *Brown v. Board of Education*. On May 24, 1954, the Supreme Court refused certiorari in a number of cases involving rights of Negroes. Only one of these cases dealt with recreation, namely, *Beal v. Holcombe* (5 Cir.) 193 F. 2d 384. In that case a municipal corporation had excluded Negroes from three golf courses, located in parks set aside for white people. The municipality provided no golf courses for Negroes. The Court of Appeals for the Fifth Circuit held that this action violated the equal protection clause of the Fourteenth Amendment, stating that it was in full accord with the reasons given and the results reached in *Law v. Mayor and City Council*, (D. C. Md. 1948) 78 F. Supp. 346, which was based upon the "separate but equal" doctrine.

On the same day the Supreme Court entered an order in three cases in which rights of Negroes had been denied below. The Court said, per curiam: "The petitions for writ of certiorari are granted. The judgments are vacated and the cases are remanded for consideration in the light of the segregation cases decided May 17, 1954, *Brown v. Board of Education, etc.*, and conditions that now prevail." 347 U. S. 971. Two of these cases involved education and are clearly controlled by *Brown v. Board of Education*. The third case, *Muir v. Louisville Park Theatrical Association*, involved the equality of the recreational facilities afforded Negroes and white persons by the City of Louisville, and the exclusion of Negroes from an amphitheatre for theatrical productions located in a city park reserved for white people. The trial court found that the failure to provide for Negroes facilities for golf and fishing, which were provided for

whites, was a violation of the Fourteenth Amendment. But trial court also held that the city violated no rights of the plaintiff by leasing the amphitheatre to a non-profit organization which excluded Negroes from the performances which it sponsored unless the city denied equal opportunities to Negro organizations to lease the amphitheatre. (W. D. Ky. 1951) 182 F. Supp. 525. The appeal involved only the second point, and the Court of Appeals for the Sixth Circuit affirmed the decision of the District Court, 202 F. 2d 275. The phrase "conditions that now prevail" in the per curiam order of the Supreme Court in the *Muir* case probably refers to the fact that the lease involved in that case had expired and therefore the case may have become moot. Counsel in the cases at bar suggested no other significant meaning for the phrase "conditions that now prevail."

What light does *Brown v. Board of Education* throw on the proper decision of the *Muir* case? The real question in that case was whether the facility was public or private. If it was a public facility, plaintiffs were clearly entitled to win on the state of the law before *Brown v. Board of Education.*

The order of May 24, 1954 in the *Muir* case had a precedent in *Rice v. Arnold,* 340 U. S. 848. In that case the City of Miami operated a public golf course, permitting Negroes to play one day a week and whites to play on other days. The Supreme Court of Florida approved this action, *Rice v. Arnold,* 45 So. 2d 195. The Supreme Court of the United States entered the following per curiam decision:

> "*Rice v. Arnold, Superintendent of Miami Springs Country Club.* On petition for writ of certiorari to the Supreme Court of Florida. *Per Curiam*: The petition for writ of certiorari is granted. The judgment is vacated and the cause is remanded to the Supreme Court of Florida for reconsideration in the light of subsequent decisions of this Court in *Sweatt v. Painter,* 339 U. S. 629, and *McLaurin v. Oklahoma State Regents,* 339 U. S. 637."

On remand, the Supreme Court of Florida said: "We should announce and adhere to our considered judgment as to the meaning of the Constitution and its application to a particular factual situation so long as it is supported by earlier decisions and is not in conflict with more recent holdings either directly or by necessary inference." It found that the *Sweatt* and *McLaurin* cases were not controlling in the field of recreation, but vacated its former judgment and again affirmed the decision of the Circuit Court, 54 So. 2d 114, including among the grounds for affirmance this time certain procedural matters, which caused the Supreme Court to refuse certiorari, 342 U. S. 946.

It is clear that the Supreme Court felt in 1950 that its decisions in *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents*, and feels now that its decisions in *Brown v. Board of Education* and *Bolling v. Sharpe*, 347 U. S. 497, throw some light on the proper decision of recreation cases. But the Supreme Court has not held that the "separate but equal" doctrine may no longer be applied in the field of recreation; it has left the matter for the lower courts to determine "in the light of" its recent decisions.

This brings us to a consideration of *Bolling v. Sharpe*, the other segregation case decided on May 17, 1954. In that case, which involved segregation in the public schools of the District of Columbia, the Court said:

> "Classification based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. As long ago as 1896, this Court declared the principle 'that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race.' * * *
>
> "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it can-

not be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

"In view of our decision that the Constitution prohibits the States from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." 347 U. S. at 499, 500.

Forematsu v. United States, 323 U. S. 214, 216, cited in *Bolling v. Sharpe*, involved the exclusion of persons of Japanese ancestry from a military area. The Court said:

"All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. This is not to say that all such restrictions are unconstitutional. It is to say that the Courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." 323 U. S. at 216.

Plaintiffs in the cases at bar contend that any classification or segregation by a state on the basis of race is prohibited by the Fourteenth Amendment unless (1) it is justified by some proper governmental objective, (2) the regulation in question is a reasonable one to achieve that objective, and (3) the separate facilities are substantially equal, inherently as well as physically, or the field of governmental activity in which the classification or segregation is made is so unimportant that no substantial rights under the Fourteenth Amendment are involved. Let us apply these tests to the regulations involved in these cases.

(1) What are the objectives sought to be attained by the regulations, and are they proper governmental objectives?

The first objective cited by defendants was the one approved by the Court of Appeals of Maryland in *Durkee v.*

Murphy, quoted above, namely: "to avoid any conflict which might arise from racial antipathies", which the court found to be "a common need to be faced in the regulation of public facilities in Maryland." 181 Md. at 265.

Plaintiffs in the case at bar argue that this is not a sufficient objective to justify segregation in any field, and that only an objective as strong as the preservation of the republic in time of war is sufficient. Plaintiffs cite *Buchanan v. Marley*, 245 U. S. 60, in support of this contention. In that case the Court held that a statute which limited the right of a property owner to transfer or convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law. The court did not hold that the promotion of the public peace by preventing race conflicts was not a proper governmental objective, but did hold that desirable as such an objective may be, it cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

In each case the importance of the objective and the extent of the alleged deprivation or damage must be considered. It may well be that only an objective as strong as the preservation of the republic will support such a clear deprivation of liberty as was involved in *Forematsu v. United States* or such a clear deprivation of property as was involved in *Buchanan v. Marley*. But it does not follow that the prevention of civil disturbance is not a sufficient objective to support separate but equal bathing and swimming facilities. *Buchanan v. Marley* was decided in 1917, and thereafter the Supreme Court continued to permit the states to supply or require separate but equal facilities in many different fields.

In *Bolling v. Sharpe* the Court held that segregation in public education is not reasonably related to any proper governmental objective. The Court did not say what governmental objective was sought to be attained by the regulation involved in that case, nor why the objective was not

a proper one, nor why segregation in education was not reasonably related to the objective if it was a proper one. The bare statement in *Bolling v. Sharpe* throws no light on the question as it is presented in cases involving only bathing and swimming facilities. Certainly neither *Brown v. Board of Education* nor *Bolling v. Sharpe* holds, or clearly implies, that the objectives sought to be attained by the State and the City in the cases at bar are not proper governmental objectives. Whether the regulations complained of are reasonably related to those objectives, whether they deny any rights created or protected by the Federal Constitution, and whether the separate facilities provided are "inherently" as well as physically equal, will be considered in (2) and (3) below.

The second objective cited by defendants in the cases at bar was "the greatest good of the greatest number", of Negroes as well as of whites. At the present stage of social development in the State of Maryland, most (but not all) Negroes are more relaxed and feel more at home among members of their own race than in a mixed group of Negroes and whites; the same is true of whites. I have never heard this statement denied, and it was not denied by counsel for plaintiffs at the hearing in this case. The fact embodied in the statement is deplored by substantially all intelligent Negroes in Maryland, and by some whites. It is quite possible that the ending of segregation in public education will change this pattern swiftly or slowly. But the fact that at this time most Negroes are more relaxed and feel more at home in their own group means that most Negroes will get more recreation from bathing and swimming with other Negroes than in mixed groups. The provision of facilities which will provide the greatest amount of recreation for most members of each group is not an unreasonable objective, though it cannot be pursued in a manner which deprives Negroes or others of their constitutional rights. Whatever constitutional rights plaintiffs may have are personal and must be enforced. That aspect of the problem will be discussed under (3) below. We are dealing

here only with the objectives which the State may properly seek to attain.

Neither the Supreme Court nor the Fourth Circuit has held that the objectives sought to be attained by the regulations in these cases are not proper governmental objectives sufficient to justify the segregation of the races at public beaches, bath houses and swimming pools, provided the regulations are reasonable and the facilities inherently as well as physically equal. *Boyer v. Garrett* is still the law of this circuit and of this district on the question of the propriety of the first objective discussed above.

(2) Are the regulations reasonable? The degree of racial feeling or prejudice in this State at this time is probably higher with respect to bathing, swimming and dancing than with any other interpersonal relations except direct sexual relations. See Gunnar Myrdal, *An American Dilemma*, pp. 606, 608 et seq., cited by the Supreme Court in *Brown v. Board of Education*. The State Board of Forestry and Parks has recognized this fact, because the segregated bath houses and beaches at Sandy Point involved in case No. 5965 are the only segregated facilities under control of that Board. The other facilities at Sandy Point State Park and at other places under the jurisdiction of that Board (none of which have bathing facilities) are completely unsegregated.

The State of Maryland and its citizens have steadily broadened the permissible and customary fields of interracial activities. Counsel for plaintiffs, at the oral argument of these cases, denied that the statement in *Durkee v. Murphy* that "separation of the races is normal treatment in this state" is still true. He cited, among others, the following facts: The last Jim Crow transportation law in Maryland was repealed in 1951. The Johns Hopkins University, Loyola College and a number of other private educational institutions admitted Negro students before the decision in *Brown v. Board of Education*. Less than three weeks after the opinion in that case was published the Board of School Commissioners of Baltimore City voted

to abolish all segregation in the Baltimore City Schools effective September, 1954. The University of Maryland recently admitted Negroes to courses where they had previously been denied admission. Many new fields of private and public employment have been opened to Negroes as the result of efforts of the Interracial Commission and other civic groups. The Junior Bar Association is now interracial. Even though the City had sustained its right to segregate the races on public golf courses and tennis courts, the Department of Recreation and Parks of the City of Baltimore agreed, in July, 1951, to permit interracial play at all times on all municipal golf courses, and set aside one or more tennis courts in four public parks for interracial play. At the same time the Board made available for interracial competition a number of baseball diamonds, soft ball diamonds, football fields, cricket fields and facilities for track and field sports. Interracial participation in the supervised programs at six playgrounds was permitted. The Board has approved additional areas for interracial activities since 1951.

Since the hearing in these cases the Housing Authority of Baltimore City has eliminated segregation at its thirteen low rent housing projects, and the University of Maryland has announced that it will admit Negroes in all of its schools.

In the face of such a record a federal judge should be slow to find the objectives of the State or City improper or the judgment of the defendant boards unreasonable, although he should not hesitate to strike down any discrimination.

The regulations providing for segregation in the Baltimore City swimming pools and at Fort Smallwood and Sandy Point are supported by the decision of the Court of Appeals of Maryland in *Durkee v. Murphy*. Similar regulations in less sensitive fields have been approved in the past by this Court and by the Fourth Circuit. *Law v. Mayor and City Council; Boyer v. Garrett.*

In the schools the children are supervised by trained and sympathetic teachers, committed to lead their students to a proper adjustment to the new conditions. The bathing and swimming facilities are for all ages, and are practically unsupervised, except by young life guards.

It is quite possible that the end of segregation in education will weaken racial feeling to the point where it will no longer be appropriate to continue segregation in these facilities; but at this time I cannot say that the regulations are unreasonable.

(3) It has been stipulated in the Sandy Point and Fort Smallwood cases that the facilities in question are physically equal at this time. No such stipulation has been made in the case involving the swimming pools. In that case the allegation of inequality was denied by defendants, and it has been stipulated that the only question to be argued at the recent hearing was the broad question of the right of the City to segregate the races in public swimming pools, and that any other question raised by the pleadings be reserved for argument at some future hearing, if necessary. For the purposes of the decision on the motions for judgment on the pleadings, therefore, all of the facilities will be considered physically equal.

Are they also "inherently" equal, or does the very fact of segregation render them "inherently" unequal? Are the rights involved of sufficient importance to amount to a denial of liberty or of equal protection of the laws within the meaning of the Fourteenth Amendment? These questions must be answered by applying to the facts of these cases appropriate criteria or tests, as the Supreme Court did in *Brown v. Board of Education*.

In *Brown v. Board of Education* the Supreme Court emphasized the importance of education in modern American life, and said that it was perhaps the most important function of state and local governments.

Although the field of public recreation is not so important a field as public education, modern urban life has made the

provision of various types of public recreation facilities for adults as well as for children an important function of state and local governments. The opportunities for free private recreation in a large city are nowhere near so great as in small towns and rural areas. Public recreation is especially important for persons in the lower economic brackets.

The first factor cited by the Supreme Court in *Brown v. Board of Education* to illustrate the importance of public education was the compulsory character of the school attendance laws. The opposite is true of recreation, which is by its very nature voluntary. This difference does not mean that recreation is not a sufficiently important field of governmental activity to give rise to rights under the Fourteenth Amendment; but it should be considered in determining whether separate recreational facilities are inherently equal, and will be discussed below.

Let us now examine the factors which caused the Supreme Court to find in *Brown v. Board of Education*, that "separate educational facilities are inherently unequal", and see whether they apply with equal force in the cases at bar, or at least with sufficient force to require this Court to find that separate bathing and swimming facilities which are physically equal, are nonetheless "inherently" unequal.

In determining that separate school facilities are inherently unequal the Supreme Court in *Brown v. Board of Education* based its decision primarily on its finding that segregation in grade and high schools causes psychological damage which deprives Negro children of equal educational opportunities. The Supreme Court said:

> "To separate them" (the antecedent of "them" was "children in grade and high schools") "solely because of their race generates a feeling of inferiority as to their status in the community which may affect their hearts and minds in a way unlikely ever to be undone." * * *
>
> " 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanc-

tion of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system'." 347 U. S. at 494.

Some of these statements might apply to segregation in recreation, although, as noted above, the Supreme Court has refrained from deciding or even clearly indicating the extent of their application in fields other than education. Certainly they apply with greatly diminished force, if at all, in the narrow field of public bathing and swimming facilities. The fact that separate bathing and swimming facilities are provided does not affect the motivation of either children or adults to bathe or swim or play. Segregation in this narrow field has little if any tendency to retard the educational or mental or any other development of Negro children and adults nor to deprive them of any of the benefits they would receive in a racially integrated system of bathing and swimming facilities, except social integration with white people.

The various types of recreational facilities differ among themselves in many ways — with respect to their educational and cultural values, with respect to the amount and kind of supervision supplied, with respect to the age groups they cater to, and with respect to the opportunity they afford for horseplay and the release of normal (or abnormal) animal spirits. We are dealing here only with swimming and bathing, which are less like education than many other types of recreation.

Plaintiffs' brief in the cases at bar quotes Butler, *Introduction to Community Recreation*, New York, 1949, p. 4, as follows: "* * * it is generally agreed that all recreation activity has certain basic characteristics. One is that the person engages in it because he desires and chooses to do

so, without compulsion of any type other than an urge from within. * * * Another characteristic is that the activity brings immediate and direct satisfaction to the individual." From this quotation plaintiffs' brief draws the conclusion: "By this definition segregation in recreation introduces a matter of compulsion which impairs its very nature." It seems to me that this argument cuts both ways. The natural thing in Maryland at this time — whether at private or public beaches or pools — is for Negroes to desire and choose to swim with Negroes and whites with whites, and for the proprietors of the facilities — whether public or private — to provide separate bathhouses, beaches and pools for the two races. An injunction prohibiting segregation would itself contain an element of compulsion which would reduce the recreational value of the facilities for many Negroes as well as whites. It is true that some Negroes and some whites — including the plaintiffs in these cases — would prefer to swim together. But the Constitution does not require the state to adopt a policy which will afford less recreation for the majority of both Negroes and whites to satisfy the desires of a few Negroes and a few whites, unless they can show that the state is denying them equal treatment or some other constitutional right.

What is involved here is not a weighing of the respective advantages furnished to the two groups. Cf. *Corbin v. County School Board of Pulaski County* (4th Cir.), 177 F. 2d 924, 926; *Carter v. School Board of Alexandria County, Va.*, (4th Cir.), 182 F. 2d 531, 535, and cases cited therein. It is stipulated that the facilities are physically equal, and unless the mere fact of segregation renders them inherently unequal the State and City are according the same or equivalent treatment to persons of different races similarly situated.

Nor do we have here any such denial of recreational or other facilities as was involved in *Beal v. Holcombe, Rice v. Arnold, or McCabe v. Atchison, etc. Ry. Co.*, 235 U. S. 151 and other transportation cases. The fact that the State and the City have provided bathing and swimming facili-

ties on a segregated basis does not mean that the State and the City have not made the opportunity for such recreation available to all on equal terms.

Finally, plaintiffs make the broad argument that separate facilities are unequal simply because they are separate. They say that any and all segregation required or sanctioned by a state is "contrary to our traditions", is degrading to Negroes, restricts their liberty, and makes the separate facilities inherently unequal.

It may be that at some time in the near or distant future the Supreme Court will seek to destroy the whole pattern of segregation and adopt the position that the States may no longer provide or require segregated facilities in any field. But it has not done so yet. The decisions in *Brown v. Board of Education* and *Bolling v. Sharpe* were limited to the field of education. See *Holmes v. City of Atlanta*, (D. C., N. D., Ga., July 8, 1954), ... F. Supp. .....

Although there are statements in both opinions which would have supported broader conclusions the Supreme Court, in *Brown v. Board of Education* said: "We conclude that in the field of education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." The conclusion in *Bolling v. Sharpe* was stated as follows: "Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause". The Court did not find that any and all segregation required or sanctioned by a state arbitrarily deprives Negroes of liberty or that all separate facilities are inherently unequal.

In *McLaurin v. Oklahoma State Regents* the Supreme Court struck down "restrictions imposed by the state which prohibit the intellectual commingling of students", not social commingling or commingling generally. And the per curiam opinions in the two recreation cases, *Rice v. Arnold* and *Muir v. Louisville Park Theatrical Association* did not

state that separate recreational facilities are unconstitutional, but remanded the cases "for reconsideration in the light of" the decisions involving education.

In the light of all the facts and decisions discussed above, I find that the facilities at Sandy Point and Fort Smallwood are "inherently" as well as physically equal. Whether the swimming pool facilities provided by the City for Negroes are equal to those provided for whites can only be determined after a full consideration of all relevant facts and of the legal points raised in such cases as *Draper v. City of St. Louis,* (E. D., Mo., 1950), 92 F. Supp. 546, and in Hyman, *Segregation and the Fourteenth Amendment,* 4 Vand. L. R. 555, at 564 (1951).

Plaintiffs' motions for judgments on the pleadings are denied.

APPENDIX B.

CONSTITUTION OF MARYLAND

ARTICLE XI-A.[1]

LOCAL LEGISLATION.

SECTION 1. On demand of the Mayor of Baltimore and City Council of the City of Baltimore, or on petition bearing the signatures of not less than 20% of the registered voters of said City or any County (provided, however, that in any case 10,000 signatures shall be sufficient to complete a petition), the Board of Election Supervisors of said City or County shall provide at the next general or Congressional election, occurring after such demand or the filing of such petition, for the election of a charter board of eleven registered voters of said City or five registered voters in any such Counties. Nominations for members for said Charter board may be made not less than forty days prior to said election by the Mayor of Baltimore and City Council of the City of Baltimore or the County Commissioners of such County, or not less than twenty days prior to said election by petition bearing the signatures written in their own handwriting (and not by their mark) of not less than 5% of the registered voters of the said City of Baltimore or said County; provided, that in any case two thousand signatures of registered voters shall be sufficient to complete any such nominating petition, and if not more than eleven registered voters of the City of Baltimore or not more than five registered voters in any such County are so nominated their names shall not be printed on the ballot, but said eleven registered voters in the City of Baltimore or five in such County shall constitute said charter board from and after the date of said election. At said election the ballot shall contain the names of said nominees in alphabetical order without any indication of the source of their nomination, and shall also be so arranged as to permit the voter to vote for or against the creation of said

[1] Added by Chapter 416, Acts of 1914, ratified November 2, 1915.

charter board, but the vote cast against said creation shall not be held to bar the voter from expressing his choice among the nominees for said board, and if the majority of the votes cast for and against the creation of said charter board shall be against said creation the election of the members of said charter board shall be void; but if such majority shall be in favor of the creation of said charter board, then and in that event the eleven nominees of the City of Baltimore or five nominees in the County receiving the largest number of votes shall constitute the charter board, and said charter board, or a majority thereof, shall prepare within six months from the date of said election a charter or form of government for said city or such county and present the same to the Mayor of Baltimore or President of the Board of County Commissioners of such county, who shall publish the same in at least two newspapers of general circulation published in said the City of Baltimore or County within thirty days after it shall be reported to him. Such charter shall be submitted to the voters of said City or County at the next general or Congressional election after the report of said charter to said Mayor of Baltimore or President of the Board of County Commissioners; and if a majority of the votes cast for and against the adoption of said charter shall be in favor of such adoption, the said charter from and after the thirtieth days[1] from the date of such election shall become the law of said City or County, subject only to the Constitution and Public General Laws of this State, and any public local laws inconsistent with the provisions of said charter and any former charter of said the City of Baltimore or County shall be thereby repealed.

SEC. 2. The General Assembly at its first session after the adoption of this amendment shall by public general law provide a grant of express powers for such County or Counties as may thereafter form a charter under the provisions of this Article. Such express powers granted to the Counties and the powers heretofore granted to the City of

[1] Thus in original.

Baltimore, as set forth in Article 4, Section 6, Public Local Laws of Maryland, shall not be enlarged or extended by any charter formed under the provisions of this Article, but such powers may be extended, modified, amended or repealed by the General Assembly.

SEC. 3. Every charter so formed shall provide for an elective legislative body in which shall be vested the law-making power of said City or County. Such legislative body in the City of Baltimore shall be known as the City Council of the City of Baltimore, and in any County shall be known as the County Council of the county. The chief executive officer, if any such charter shall provide for the election of such executive officer, or the presiding officer of said legislative body, if such charter shall not provide for the election of a chief executive officer, shall be known in the City of Baltimore as Mayor of Baltimore, and in any County as the President of the County Council of the County, and all references in the Constitution and laws of this State to the Mayor of Baltimore and City Council of the City of Baltimore or to the County Commissioners of the Counties, shall be construed to refer to the Mayor of Baltimore and City Council of the City of Baltimore and to the President and County Council herein provided for whenever such construction would be reasonable. From and after the adoption of a charter by the City of Baltimore, or any County of this State, as hereinbefore provided, the Mayor of Baltimore and City Council of the City of Baltimore or the County Council of said County, subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws of said City or County including the power to repeal or amend local laws of said city or county enacted by the General Assembly, upon all matters covered by the express powers granted as above provided; provided that nothing herein contained shall be construed to authorize or empower the County Council of any County in this State to enact laws or regulations for any incorporated town, village or municipality in said County, on any matter covered by the powers granted to

said town, village, or municipality by the Act incorporating it, or any subsequent Act or Acts amendatory thereto. Provided, however, that the charters for the various Counties shall provide that the County Council of the Counties shall not sit more than one month in each year for the purpose of enacting legislation for such Counties, and all legislation shall be enacted during the month so designated for that purpose in the charter, and all laws and ordinances so enacted shall be published once a week for three successive weeks in at least one newspaper published in such Counties, so that the taxpayers and citizens may have notice thereof. This provision shall not apply to Baltimore City. All such local laws enacted by the Mayor of Baltimore and City Council of the City of Baltimore or the Council of the Counties as hereinbefore provided, shall be subject to the same rules of interpretation as those now applicable to the Public Local Laws of this State, except that in case of any conflict between said local law and any Public General Law now or hereafter enacted the Public General Law shall control.

SEC. 4. From and after the adoption of a charter under the provisions of this Article by the City of Baltimore or any County of this State, no public local law shall be enacted by the General Assembly for said City or County on any subject covered by the express powers granted as above provided. Any law so drawn as to apply to two or more of the geographical sub-divisions of this State shall not be deemed a Local Law, within the meaning of this Act. The term "geographical sub-division" herein used shall be taken to mean the City of Baltimore or any of the Counties of this State.

SEC. 5. Amendments to any charter adopted by the City of Baltimore or by any County of this State under the provisions of this Article may be proposed by a resolution of the Mayor of Baltimore and the City Council of said the City of Baltimore, or the Council of said County, or by a petition signed by not less than 20% of the registered voters of said City or County, provided, however, that

in any case 10,000 signatures shall be sufficient to complete a petition, and filed with the Mayor of Baltimore or the President of the County Council, and when so proposed shall be submitted to the voters of said City or County at the next general or congressional election occurring after the passage of said resolution, or the filing of said petition; and if at said election the majority of the votes cast for and against said amendments shall be in favor thereof, said amendment shall be adopted and become a part of the charter of said City or County from and after the thirtieth day after said election. Said amendments shall be published by said Mayor of Baltimore or President of the County Council once a week for five successive weeks prior to said election in at least one newspaper published in said City or County.

SEC. 6. The power heretofore conferred upon the General Assembly to prescribe the number, compensation, powers and duties of the County Commissioners in each county, and the power to make changes in Sections 1 to 6 inclusive, Article XI of this Constitution, when expressly granted as hereinbefore provided, are hereby transferred to the voters of each County and the voters of the City of Baltimore, respectively, provided that said powers so transferred shall be exercised only by the adoption or amendment of a charter as hereinbefore provided; and provided further that this Article shall not be construed to authorize the exercise of any powers in excess of those conferred by the Legislature upon said Counties or City as this Article sets forth.

SEC. 7. The word "Petition" as used in this Article means one or more sheets written or printed, or partly written and partly printed; "Signature" means the signature of a registered voter written by himself in his own handwriting (and not by his mark), together with the ward or district and precinct in which he is registered. The authenticity of such signatures and the fact that the persons so signing are registered voters shall be evidenced by the affidavit of one or more registered voters of the City or County in which said voters so signing are registered, and one

affidavit may apply to or cover any number of signatures to such petition. The false signing of any name, or the signing of any fictitious name to said petition shall be forgery, and the making of any false affidavit in connection with said petition shall be perjury.

Annotated Code of Maryland — *Article 66 C*, Volume 2, pages 3291-2.

340. Forest, parks, scenic, historic and recreation areas of the State of Maryland are basic assets. Their proper use, development and preservation are necessary to protect and promote the health, safety, economic and general welfare of the people of the State. It is hereby declared to be the policy of the State to encourage the economic development and use of its natural resources for the improvement of local economy, preservation of the natural beauty and promotion of the recreational interest throughout the State.

The Department of Forests and Parks is hereby created to promote, administer and manage all State owned or leased forests, parks, scenic preserves, parkways, historic monuments and recreation areas, the administration of all laws, rules and regulations relating to forests, parks, scenic preserves, parkways, historic monuments and recreation areas, fire control, roadside trees, the restoration of deforested or denuded areas, and the operation of the State Forest Nursery.

* * * * * *

"A Commission of Forests and Parks is hereby created to supersede the present advisory Board of Forestry and Regents of the University of Maryland in supervising and directing the affairs of this Department. The Commission shall consist of five members, citizens of the State, to be appointed by the Governor, one of whom shall be appointed on the recommendation of the Maryland State Grange, one on the recommendation of the Maryland Farm Bureau, one shall have had practical experience in the business of lumbering, and the other two shall be appointed for their

general interest in the advancement of State Parks and recreation. The members of the Commission shall select their own Chairman."

* * * * * *

342. The Department of Forests and Parks shall have the power to purchase and manage lands in the name of the State, suitable for forest culture, reserves, watershed protection, State Parks, scenic preserves, historic monuments, parkways and State recreational reserves, using for such purposes any special appropriation or any surplus money not otherwise appropriated, which may be standing to the credit of the Forest Reserve or Park Reserve Fund, provided that on and after June 1, 1947, no individual tract of land in excess of one hundred acres shall be purchased in Garrett County, except with the approval of the County Commissioners of said County and to make all rules and regulations governing State Reserves, State Parks, scenic preserves, parkways, historic monuments and recreation areas to prepare, print or distribute printed matter relating to the State Forests, Parks, scenic preserves, parkways, historic monuments and recreation areas, and to employ such labor and do such work as it deems wise in developing and protecting State Reserves under its jurisdiction; and the Governor of the State is authorized upon the recommendation of said Department of Forests and Parks to accept lands as gifts, devise or by other means in the name of the State the same to be held, protected and administered by the Department of Forests and Parks as State Parks or Reserves, and to be used so as to demonstrate the practical utility of same for recreational areas, State Parks, scenic preserves, parkways, and historic monuments, timber culture, water conservation and as a breeding place for game. Such gifts must be absolute except for the reservation of all mineral and mining rights over and under said lands, and a stipulation that they shall be administered as State Forest Reserves or State recreation areas, and the Attorney General of the State is directed to see that all deeds to the State of lands mentioned above are properly executed before the gift is accepted.

Charter and Public Local Laws of Baltimore City (Flack 1949), page 122.

96. RECREATION AND PARKS — *General Powers and Duties.* The Board of Recreation and Parks shall have the following powers and duties:

(a) to establish, maintain, operate and control parks, zoos, squares, athletic and recreational facilities and activities for the people of Baltimore City, and to have charge and control of all such property and activities belonging to, or conducted by, the City;

(b) to provide concerts, symphonies and other musical entertainment for the people of Baltimore City;

(c) to have charge and control of all monuments belonging to the City;

(d) to rent for its use buildings and other places suitable for the conduct of the activities of the Department. The Board is hereby authorized and empowered, with the consent of any other municipal agency, to organize and conduct play and recreational activities on grounds and in buildings under the control of such other agency and on such conditions as may be agreed to by such other agency;

(e) to be responsible for the construction and repair of the sidewalks which border on any public park or square to the curb lines of said sidewalks as now or hereafter established;

(f) to direct the distribution of the park fund for or towards the maintenance of the different parks and squares provided, that no part of said fund shall be expended except in accordance with the provisions of the annual Ordinance of Estimates. Anything in Section 30 to the contrary notwithstanding, no part of any appropriation for any bureau of this Department shall be transferred to another Bureau unless such transfer is first approved by ordinance;

(g) to charge and collect fees for admission, service and the use of facilities, and rentals for the use of property

controlled by it; provided, that no lease of such facilities shall be made for a period of thirty days or more (or for successive periods aggregating thirty days or more) without the prior approval of the Board of Estimates. All moneys collected by the Department shall be accounted for and paid to the Treasurer at such intervals as he may prescribe;

(h) to adopt and enforce rules and regulations for the management, use, government and preservation of order with respect to all land, property, and activities under its control. To carry out such regulations, fines not exceeding $100.00 in any one case shall be imposed for breaches of said rules and regulations, which fines shall be enforced and collected as other fines are enforced and collected by law;

(i) to have jurisdiction and control over the sidewalks which border on any public park or square to the curb lines of said sidewalks, as now or hereafter established, said jurisdiction to be exercised concurrently with that of the Police Commissioner or any other authority lawfully exercising the same.

Charter of Baltimore City 1949, page 5.

GENERAL POWERS

6. The Mayor and City Council of Baltimore shall have full power and authority to exercise all of the powers heretofore or hereafter granted to it by the Constitution of Maryland or by any Public General or Public Local Laws of the State of Maryland; and in particular, without limitation upon the foregoing, shall have power by ordinance, or such other method as may be provided for in its Charter, subject to the provisions of said Constitution and Public General Laws:

* * * * * *

(19) PARKS AND RECREATION (page 21)

To establish, maintain, control and regulate parks, squares, monuments and recreation facilities.

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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1955

No. 232

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,

Appellants,

vs.

ROBERT M. DAWSON, JR., *et al.*,

Appellees.

R. BROOKE MAXWELL, etc., *et al.*,

Appellants,

vs.

MILTON LONESOME, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Fourth Circuit

MOTION TO DISMISS OR AFFIRM

Robert L. Carter,
Tucker Dearing,
Linwood Koger, Jr.,
Thurgood Marshall,
Attorneys for Appellees.

Jack Greenberg,
Juanita Jackson Mitchell,
Of Counsel.

Supreme Printing Co., Inc., 114 Worth Street, N. Y. 13, BEekman 3-2320
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IN THE

Supreme Court of the United States

October Term, 1955

No. 232

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,
Appellants,

vs.

ROBERT M. DAWSON, JR., *et al.*,
Appellees.

R. BROOKE MAXWELL, etc., *et al.*,
Appellants,

vs.

MILTON LONESOME, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that these appeals be dismissed as improperly brought on the ground that the constitutionality of a "state statute" within the meaning of Title 28, United States Code, Section 1254(2) is not here in issue, and, in the alternative, move that the final judgment and decree of the Court of Appeals be affirmed on the ground that it is so clearly correct as not to warrant further argument.

Statement

These are two appeals, consolidated in the court below and here, from a final judgment and decree entered by the Court of Appeals on March 14, 1955, reversing the judgment of the District Court which had refused to grant injunctive relief against the enforcement of racial segregation in public beaches at Sandy Point State Park and at Fort Smallwood Park. The basis for the District Court's decision (123 F. Supp. 193) was that *Brown* v. *Board of Education*, 347 U. S. 483, and *Bolling* v. *Sharpe*, 347 U. S. 497, did not apply and that the "separate but equal" doctrine remained the appropriate constitutional yardstick in the field of public recreation here involved. The Court of Appeals (220 F. 2d 386) reached a contrary conclusion on the ground that rationale governing disposition of these cases was to be found in *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Henderson* v. *United States*, 339 U. S. 816; *Brown* v. *Board of Education, supra;* and *Bolling* v. *Sharpe, supra*, and not in *Plessy* v. *Ferguson*, 163 U. S. 537, and that racial segregation could no longer be justified on a mere showing that the tangible facilities furnished one race was equal to those furnished the other. Appellants brought the cases here. Appellees were granted leave to file their motion to dismiss or affirm on or before September 30, 1955.

Argument

1. While appellees would prefer that these appeals be disposed of on their merits, it must be pointed out that appellants' right to appeal to this Court is beclouded with doubt. If appellants have chosen the improper procedure to seek review in this Court, their appeals must be dismissed without more. Appellants urge that the Court treat their appeals as petitions for writs of certiorari in the event

that an appeal will not lie. As petitioners for writs of certiorari, however, they were filed untimely, and in view of appellants non-compliance with Title 28, United States Code, Section 2101(c), this Court has no jurisdiction to treat these appeals as petitions for writs of certiorari. They must stand or fall on whether the jurisdictional prerequisites under 1254(2) have been met.

Appellants claim that they may appeal as of right in these cases and that the Supreme Court is vested with jurisdiction by virtue of Title 28, United States Code, Section 1254(2) which provides that:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: . . . (2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . .

Appellants, however, have produced no authority for the proposition that the informal rules requiring segregation, maintained and enforced by appellants, the Commission of Forests and Parks and the Board of Recreation and Parks, or the regulations and practices of the Board of Recreation and Parks of the City of Baltimore are "state statutes" within the meaning of Section 1254(2). None of the cases which they cite reach appellants' situation. *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262; *New York* v. *Latrobe*, 279 U. S. 421; *Republic Pictures Corp.* v. *Kappler*, 151 F. 2d 543 (CA 8th 1945), aff'd, 327 U. S. 757, rehearing denied, 327 U. S. 817; *Public National Bank of New York* v. *Keating*, 47 F. 2d 561 (CA 2nd 1931), aff'd, 284 U. S. 587, concerned challenges to the constitutionality of statutes enacted by state legislatures. *City of Richmond* v. *Deans*, 37 F. 2d 713 (CA 4th 1930), aff'd, 281 U. S. 704, involved a zoning ordinance enacted by a municipality.

It must be admitted, however, that appellees have found no authority which affirmatively forecloses the question against appellants' jurisdictional claim. Relatively few cases have reached this Court on appeal from the Courts of Appeals since Section 1254(2) was enacted in its present form in 1925, and none have necessitated an examination of the meaning of "state statute."

An examination of the House and Senate reports and the Congressional debates on the bill does not illuminate the issue. The bill as originally presented and reported would have abolished all appeals from Courts of Appeals to the Supreme Court, leaving certiorari as the only route available to a defeated party. A number of Senators, alarmed at the possibility that the Courts of Appeals might become the final arbiters in cases involving the constitutionality of state statutes, offered an amendment vesting appellate jurisdiction in the Supreme Court in cases where the Courts of Appeals held state statutes unconstitutional, and thus Section 1254(2) was enacted in its present form. 66 Cong. Rec. 2876-2880, 2916-2929 (1925). See also Frankfurter and Landis. *The Business of the Supreme Court* 276-278 (1927). No legislator, however, attempted to give content to the word "statute."

Moore, in his *Commentary on the U. S. Judicial Code* (1949) at page 552, suggests that "statute" under Section 1254(2) be given the same meaning as "statute of any state" in Section 1257(2)—the section giving the Supreme Court appellate jurisdiction over certain cases decided by the highest courts of the state. Counsel was unable to find any legislative history or decisional law to support Moore's thesis that this is the proper construction of Section 1254(2). Needless to say, acceptance of this contention would greatly aid appellants in their effort to sustain their position that direct appeal is procedurally proper in these cases.

The rule governing Section 1257(2) was first stated in *William* v. *Bruffy,* 96 U. S. 176, where the Court said at p. 183:

> Any enactment from whatever source originating to which a state gives the force of law is a statute of the state, within the meaning of the clause cited relating to the jurisdiction of this court.

Although the statute has been materially changed since the advent of the *Bruffy* case, this Court has adhered to the rule there stated. Thus, this Court has sustained its appellate jurisdiction in cases involving challenges to municipal ordinances, *King Manufacturing Co.* v. *Augusta,* 277 U. S. 100; and to the orders of state agencies and commissions. *Sultan Ry. & T. Co.* v. *Department of Labor & Industries,* 277 U. S. 135; *Hamilton* v. *University of California,* 293 U. S. 245. These decisions and others, see, *e. g., People ex rel. McCollum* v. *Board of Education,* 333 U. S. 203; *Atchison Topeka and Santa Fe Ry. Co.* v. *Public Utilities Commission,* 346 U. S. 346, might be distinguished on the ground that, in each case, the agency's order was clearly authorized by a state statute.

It must be conceded, however, that it would be more difficult to distinguish the rationale. In the *McCollum* and *Atchison* cases, the Court held that the fact that the highest court of the state had sustained the agency action, as authorized by state law, was sufficient to show that the validity of a "statute" was drawn into question. Here, as appellants have noted, the highest court of Maryland has held that appellants' policy of segregation is authorized by state law. *Durkee* v. *Murphy,* 181 Md. 259, 39 Atl. 2d 253 (1942).

Nevertheless, as noted previously, there is no decisional or legislative authority, we know of, to warrant a conclusion that those cases giving force and meaning to Section

1257(2) control the construction of the scope and meaning of 1254(2). In fact, in *King Manufacturing Co.* v. *Augusta, supra,* the leading modern case interpreting the meaning of "statute" under Section 1257(2), this Court specifically stated that its decision was limited to cases coming from state courts and should not be construed as an interpretation of other jurisdictional provisions. Indeed, logic would seem to favor giving "state statute" as used in Section 1254(2) a strict and technical construction, since an appeal to this Court as a matter of right is allowable only in an extraordinary class of cases.

It may well be that this Court should now clarify this somewhat obscure procedural question, but, we submit, appellants have chosen to pursue a hazardous procedural course and subject their appeals to dismissal on jurisdictional grounds.

2. The logic of the decision of the Court of Appeals is, inescapable, we submit. Here appellees sought unrestricted use of public beaches and parks operated by the State of Maryland and the city of Baltimore on the grounds that the enforced racial segregation was unconstitutional in the light of the rejection of the "separate but equal" doctrine by this Court in the *School Segregation Cases.* While it is true that *Brown* v. *Board of Education* and *Bolling* v. *Sharpe,* involve public education at the elementary and secondary school levels, the rationale of those cases is applicable here and must govern disposition of this controversy. It could hardly be held under the facts of these cases that racial segregation constitutes a denial of "equal protection of the laws" and "due process of law" when practiced in public schools, and is consistent with those constitutional concepts in the field of public recreation. The judgment of the Court of Appeals is clearly correct and should be affirmed.

CONCLUSION

Wherefore, for the reason hereinabove stated, it is respectfully submitted that these appeals should be dismissed and/or that the judgment appealed from should be affirmed.

ROBERT L. CARTER,
TUCKER DEARING,
LINWOOD KOGER, JR.,
THURGOOD MARSHALL,
Attorneys for Appellees

JACK GREENBERG,
JUANITA JACKSON MITCHELL,
Of Counsel.

NOVEMBER 7, 1955.

Decisions Per Curiam.

No. 232. MAYOR AND CITY COUNCIL OF BALTIMORE CITY ET AL. *v.* DAWSON ET AL. Appeal from the United States Court of Appeals for the Fourth Circuit. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *C. Ferdinand Sybert*, Attorney General of Maryland, *Norman P. Ramsey*, Deputy Attorney General, and *Ambrose T. Hartman*, Assistant Attorney General, for appellants. *Robert L. Carter*, *Thurgood Marshall* and *Jack Greenberg* for appellees. Reported below: 220 F. 2d 386.